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In the Supreme Court of the United States

OCTOBER TERM, 1936

No. 247

EDWARD T. BLAIR, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Board of Tax Appeals (R. 102) is reported in 31 B. T. A. 1192. The opinion of the Circuit Court of Appeals (R. 125) is reported in 83 F. (2d) 655.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on April 11, 1936 (R. 138). Petition for rehearing was filed May 1, 1936 (R. 138), which was denied May 27, 1936 (R. 139). Petition for certiorari was filed July 31, 1936. The jurisdiction

of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether specified amounts of income assigned by petitioner to his children, out of income payable to him under a trust created by his father's will, were taxable to petitioner or to such children.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in the Appendix, *infra*. pp. 10–12.

STATEMENT

The facts were stipulated (R. 28–32). As found by the Board they may be summarized as follows (R. 94–101):

Petitioner and Chauncy J. Blair were named trustees of a trust created by the will of William Blair, father of the former (R. 32–41). By the will, the trustees were directed to pay deceased's wife one-half of the net income from the trust property as it arose or accrued during her lifetime, and to pay the other half to the petitioner during his lifetime. The trust provided that upon the death of the wife the whole of the net income was to be paid to petitioner during his life (R. 36). Upon the death of the survivor of the wife and petitioner (subject to limitations not here material) the principal of the trust was to pass to petitioner's children or their issue (R. 37).

The will contained the following provision (R. 94–95):

> TWENTY: I do hereby declare and direct that the income from said trust fund and estate which is herein ordered to be, from time to time as the same shall be received paid to my said wife and to my said son and to his said wife and to their children and descendants of children in the cases aforesaid shall be paid to them directly upon their separate order and receipt therefor, for their sole and separate use respectively, and that the same shall not be nor be made nor held in any manner nor by any proceedings whether in law or equity while yet in the hands of said trustees liable for or subject to the payment of any of the debts or obligations of either of the persons entitled to the same as above herein set forth.

The wife died on or about March 13, 1923. After her death petitioner executed and delivered a series of indentures to his children. Each of them provided, in substance, that petitioner, in consideration of love and affection and $1, did thereby sell, assign, transfer, and set over to said children "an interest" of specified amounts (in some instances payable annually, in others payable monthly) "in the net income which the * * * [petitioner] now is, or may hereafter be, entitled to receive during his life from the Trustees under the Will of William Blair" (R. 95–97). Each of such indentures authorized and empowered the child "either in her own name or in the name of the said party of the

first part, to receive and receipt to the Trustees" for the specified amount "in each year thereafter of the income and moneys which shall at any time become payable to" petitioner under the terms of the will of William Blair (R. 95). Each indenture also provided that all payments should be made in person to the particular child and not upon order or assignment, nor by transfer by operation of law, and were to cease upon the death of either party thereto (R. 95). The trustees, who have, since 1923, been petitioner and his son (R. 97), accepted the assignments and, during the years 1924–1926 and 1929, paid to petitioner's children the sums therein specified out of the income of the trust (R. 97).

In a prior case, which involved petitioner's income tax for the year 1923, the Court of Appeals for the Seventh Circuit held that the trust here involved was a spendthrift trust and that the petitioner lacked power to make the above assignments. *Commissioner* v. *Blair,* 60 F. (2d) 340, certiorari denied, 288 U. S. 602. After that decision the trustees (of whom petitioner is one) filed a complaint in the Superior Court of Cook County, Illinois, naming petitioner, individually, and petitioner's children as defendants, reciting the income tax question and the decision of the Circuit Court of Appeals, *supra,* and praying the court to construe the will of William Blair. The Superior Court held that the trust was a spendthrift trust and that the assignments in question were

invalid. Upon appeal the Appellate Court of Illinois, First District, reversed the lower court and held that the assignments were valid. *Blair* v. *Linn,* 274 Ill. App. 23.

In the instant case the Board held that notwithstanding the prior decision of the Circuit Court of Appeals it was bound by the decision of the Illinois court, and that under that decision the income paid to his children by the trustees was not taxable to petitioner (R. 102–108). The Circuit Court of Appeals, though not without doubt, also held itself bound by the decision of the Illinois court, but determined that the assignments were in legal effect merely a direction to pay to his children various specified amounts of the income due petitioner, which were not deliverable until it was petitioner's to dispose of, and therefore such income was taxable to him (R. 125–137).

ARGUMENT

1. Petitioner contends that the decision below, holding that trust income which he had assigned to his children was nevertheless taxable to him, is in conflict with several decisions of other circuit courts of appeals. The Government submits that the court below has correctly applied the applicable principles of law to the particular facts in this case in a way not in conflict with other decisions.

Two decisions of this Court have stated the applicable principle: a bare assignment of future in-

come, without the assignment of that which produced it, cannot operate to relieve the assignor of taxes on such income. *Lucas* v. *Earl,* 281 U. S. 111; *Burnet* v. *Leininger,* 285 U. S. 136. Obviously, under that rule, the question in the instant case is not resolved by the decision of the Illinois court that the trust here involved is not a spendthrift trust. Assuming, as did the court below, that the terms of the trust barred only involuntary transfers (See *Griswold,* Spendthrift Trusts, Secs. 358, 360 (1936)), the question remains whether the assignment made was of a character which would relieve petitioner of his tax liability.

The court below held that the opinion of the Illinois Appellate court required the conclusion that the assignments made by petitioner were not of a share in the corpus, but only of specified amounts payable out of the income as he received it. Petitioner could, in other words, deliver to the trustees a standing authorization to deliver to his children an annual, or monthly sum, but the money could not, under the terms of the trust, pass to the children until it was petitioner's to dispose of. The Illinois court stated (R. 84; 274 Ill. App. 23, 29–30):

> The words said to prohibit the assignments are, that the income should be paid to the testator's wife and to his son "directly upon their separate order and receipt therefor, for their sole and separate use * * *." * * * *The word "order"*

> *means a writing "requiring the party to whom it is addressed to deliver property of the person making the order to some one therein described."* * * * To pay the income to someone other than a beneficiary would require an order on the trustees signed by the beneficiary. *The language of the will implies the very thing that has been done by the assignments.* (Italics supplied.)

The statement, it is submitted, must be construed as a decision that petitioner has given to his children merely an order on the trustees to pay them, at stated times, specified amounts out of his income.

The cases upon which petitioner relies (Pet. 9–12) are not in conflict. In most of them, the assignment was of an interest in the property producing the income, rather than of the income itself, or, at least, was so construed by the court. *Nelson* v. *Ferguson,* 56 F. (2d) 121 (C. C. A. 3d), certiorari denied, 286 U. S. 565; *Helvering* v. *Coxey,* 79 F. (2d) 661 (C. C. A. 3d), reversed on other grounds, 297 U. S. 694; *Rose* v. *Commissioner,* 65 F. (2d) 616 (C. C. A. 6th); *Tracy* v. *Commissioner,* 70 F. (2d) 93 (C. C. A. 6th); *Hall* v. *Burnet,* 54 F. (2d) 443 (App. D. C.), certiorari denied, 285 U. S. 552; *Helvering* v. *Seatree,* 72 F. (2d) 67 (App. D. C.). See also *Copland* v. *Commissioner,* 41 F. (2d) 501 (C. C. A. 7th). In two cases cited by petitioner (Pet. 12) the income was held taxable to the assignor be-

cause no interest in the corpus had been assigned. *Saenger* v. *Commissioner,* 69 F. (2d) 631 (C. C. A. 5th); *Edward G. Swartz, Inc.* v. *Commissioner,* 69 F. (2d) 633 (C. C. A. 5th). See also *Brewster* v. *United States,* 9 F. Supp. 686 (Ct. Cl.)

The Circuit Court of Appeals for the Second Circuit has, it is true, adopted a somewhat different rationale for the decision of cases of this nature. However, the results reached in that circuit are entirely consistent with the test applied in the other circuits. In *Commissioner* v. *Field,* 42 F. (2d) 820 (C. C. A. 2d), the language of the assignment clearly indicates an intention to transfer an undivided interest in the corpus of the trust estate. Apart from the language of the assignment, it is significant that not an annual sum certain, but a stated percentage of the income, was to go to the assignee. In *Lowry* v. *Helvering,* 70 F. (2d) 713 (C. C. A. 2d), the assignment, which was of all the income from the trust, was made in New York where, as the court points out, an assignment of all of the income, without more, is effective to transfer the interest of the assignor in the corpus. See 70 F. (2d) 714. This is also the explanation of the decision in *Shanley* v. *Bowers,* 81 F. (2d) 13 (C. C. A. 2d).

2. Petitioner also alleges a conflict with certain decisions of this Court which have adjudged the rights of a life beneficiary in a trust estate (Pet. 12–13). As already pointed out, however, the de-

cision in the present case depends upon the peculiar nature of petitioner's interest, as determined by the Illinois court.

CONCLUSION

The decision of the court below correctly applies the rules laid down by this Court to the particular facts of the case. There is no conflict with other decisions. The petition should, therefore, be denied.

Respectfully submitted.

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SEPTEMBER 1936.

APPENDIX

Revenue Act of 1924, c. 234, 43 Stat. 253:

SEC. 213. For the purposes of this title, except as otherwise provided in section 233—

(a) The term "gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service * * *, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever * * *.

(b) The term "gross income" does not include the following items, which shall be exempt from taxation under this title:

* * * * *

(3) The value of property acquired by gift, bequest, devise, or descent (but the income from such property shall be included in gross income);

* * * * *

SEC. 219. (a) The tax imposed by Parts I and II of this title shall apply to the income of estates or of any kind of property held in trust, including—

* * * * *

(b) Except as otherwise provided in subdivisions (g) and (h), the tax shall be com-

puted upon the net income of the estate or trust, and shall be paid by the fiduciary. The net income of the estate or trust shall be computed in the same manner and on the same basis as provided in section 212, except that—

* * * * *

(2) There shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year which is to be distributed currently by the fiduciary to the beneficiaries, and the amount of the income collected by a guardian of an infant which is to be held or distributed as the court may direct, but the amount so allowed as a deduction shall be included in computing the net income of the beneficiaries whether distributed to them or not. * * *

The corresponding provisions of Section 213 (a) and (b), and Section 219 (a) and (b), of the Revenue Act of 1926 are identical with the foregoing; and the corresponding provisions of Section 22 (a) and (b) and Section 162 (b) of the Revenue Act of 1928 are substantially the same.

Treasury Regulations 65, promulgated under the Revenue Act of 1924:

ART. 73. *Gifts and bequests.*—Property received as a gift, or received under a will or under statutes of descent and distribution, is exempt from the income tax, although the income therefrom derived from investment, sale, or otherwise is not. * * *

ART. 342. *Method of computation of net income and tax.*—The statute provides that the tax computed upon the net income of the estate or trust shall be paid by the fidu-

ciary, except in the case of the trusts described in article 347. However, in computing the net income of the estate or trust, the following deductions will be allowed either in addition to, or in lieu of (as the case may be) those specified in section 214 in the case of individuals:

* * * * *

(2) The amount of the income of the estate or trust for its taxable year which is to be distributed currently by the fiduciary to the beneficiaries, and the amount of the income collected by a guardian of an infant which is to be held or distributed as the court may direct, shall be allowed as an additional deduction in computing the net income of the estate or trust. The amount so allowed as a deduction must be included by a beneficiary in computing his net income, whether distributed to him or not. If the taxable year of the beneficiary differs from that of the estate or trust, the amount which he is required to include in computing his net income shall be based upon the income of the estate or trust for its taxable year ending within his taxable year. * * *

The corresponding provisions of Articles 73 and 342 of Regulations 69, relating to the Revenue Act of 1926, are identical with the foregoing; and the corresponding provisions of Articles 83 and 862 of Regulations 74, relating to the Revenue Act of 1928, are substantially the same.

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